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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 25

UNITED STATES OF AMERICA, PETITIONER

v.

THOMAS F. JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals is reported at 337 F. 2d 180. The opinion of the district court is reported at 215 F. Supp. 300.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1964. On October 19, 1964, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 15,

1964 (a Sunday). The petition was filed on November 16, 1964, and was granted on January 25, 1965 (379 U.S. 988). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Constitution, particularly Article I, Section 6, providing that "for any Speech or Debate in either House," no member of Congress shall "be questioned in any other Place," bars criminal prosecution of a Congressman for accepting a bribe to make a speech in Congress.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6, of the United States Constitution provides in part:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

18 U.S.C. 281, which was superseded by more comprehensive legislation subsequent to the commission of the acts involved in this case, provided in pertinent part:

> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, or the head of a department, or other officer or employee of the United States or any department or agency thereof, directly or indirectly receives or agrees to receive, any compensation for any services rendered or to be rendered, either by himself or another, in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or directly or indirectly interested, before any department, agency, court martial, officer, or any civil, military, or naval commission, shall be fined not more than $10,000 or imprisoned not more than two years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On April 1, 1963, an eight-count indictment was returned in the United States District Court for the District of Maryland charging in count one that respondent and Frank W. Boykin, then Congressmen, conspired with two others between April 1, 1960, and

December 31, 1961, to defraud the United States of its right to have the Congressmen's duties performed free from corruption and uninfluenced by payments of money and to have the business of the Department of Justice conducted impartially. It was charged that, as part of the conspiracy, both Congressmen were paid by the other defendants to try to persuade the Department of Justice to postpone the trial of, and ultimately dismiss, mail fraud charges pending against persons connected with the First Colony Savings and Loan Association and that respondent was paid to make a speech in Congress defending the operation of independent savings and loan associations (App. 1-19).[1] The seven other counts (App. 19-30) charged that respondent, aided by the other defendants, was paid to intercede with Justice Department officials to persuade them to postpone the mail fraud trial and dismiss the pending indictment, in violation of the conflict-of-interest statute then in effect, 18 U.S.C. 281 (see *supra*, pp. 2-3). Respondent's motion to dismiss the indictment on various grounds, including the contention that count one was barred by the speech or debate privilege of Article I, Section 6 (*supra* p. 2), was denied by the trial court (App. 48, 52-56). After a trial by jury, all defendants were convicted on all counts (App. 42-43). Respondent was sentenced to imprisonment for a concurrent period of six months on each count and was fined $5000 on the conspiracy count (App. 44-45).

[1] "App." refers to the appellants' appendix in the court below, filed as Volumes 1 and 2 of the record in this Court. "R." refers to Volume 3 of the record filed in this Court. "Tr." refers to the Trial Transcript.

In pertinent part, the government's evidence showed that, in 1960 and 1961, defendant J. Kenneth Edlin, the dominant figure in two Maryland savings and loan institutions (First Colony and First Continental), was under indictment for mail fraud in connection with activities of First Colony (App. 205-206, 265-266). In April 1960, Edlin and an associate, defendant William L. Robinson, consulted with Martin Heflin, a public relations counselor, on the desirability of having a speech delivered in Congress on behalf of independent savings and loan associations (App. 180-184). After a meeting with respondent in May, Heflin and Robinson supplied material for a proposed speech to respondent's administrative assistant (App. 189-190; cf. R. 4-5). In the first week in June, Edlin told his secretary that he had a Congressman as a "new contact," as a result of which, "we are going to be rich" (App. 161). At about the same time, Robinson informed Edlin's secretary that Congressman Johnson was "on our pay roll" (App. 162). On June 20, 1960, Robinson sent respondent a check for $500 (App. 250-251, 564-565). Ten days later, respondent delivered a speech in Congress defending independent savings and loan associations (App. 931-937).[2] Either immediately before or immediately

[2] The only official copy of the speech, contained in the Congressional Record, that was introduced at the trial was placed in evidence by respondent (App. 470). Earlier in the trial, the government had introduced, without objection, one of the reprints paid for by First Continental, for the purpose of showing that parts of the text were underscored for use in encouraging prospective depositors (App. 258-260).

after the speech was made, Edlin displayed a copy of its text, commenting that there was no reason to fear the mail fraud indictment since "we have friends on the Hill" (R. 4). The only reprints made of the speech were purchased by First Continental and were used to induce prospective savers to deposit money in Edlin's savings and loan associations (App. 205-206, 257-264; R. 11-12).

Between August 1960 and March 1961, respondent received $3700 in checks from Robinson (Tr. 197-199, 716-728, 957-958). Between March and October 1961, respondent and Congressman Boykin visited officials of the Department of Justice to discuss the mail fraud charges pending against Edlin in an effort to convince the Department that the indictment should be dismissed (App. 356-358, 366-389, 837-846). During this period, respondent received over $19,000 from Robinson and First Continental (R. 5-11, 15-22).

In his defense, respondent testified that he delivered the speech in response to a newspaper article and in order to create an issue for a forthcoming congressional campaign (App. 567-569). He said that the $500 check he received in June 1960 was a campaign contribution (App. 565-569; R. 84-85) and that the other payments were for the performance of various legal services (App. 575-747; R. 93-193).

The court of appeals found "the evidence sufficient to support a guilty verdict on all counts" (R. 326). Nevertheless, it reversed respondent's conviction on count one on the ground that the speech or debate clause of Article I, Section 6 bars a criminal prosecution of a Congressman for accepting money to make

a speech in Congress. The court deemed this interpretation necessary in order "to promote the independence of all congressmen" and "[t]o avoid restraint on free expression on the floor of either House" (R. 304). It ruled in this connection "that whenever the motivation for making a speech is called into question, the privilege applies," and "that the Constitution has clothed the House of which [respondent] is a member with the sole authority to try him" (R. 299, 303). In reaching this conclusion the court of appeals (R. 301) agreed with the district court (App. 56) that, for the purpose of determining the applicability of Article I, Section 6, there is no significant difference between a charge under the conflict-of-interest law that a Congressman accepted a bribe to make a speech and a charge, as here, that a Congressman made a speech for money as part of a conspiracy to defraud the United States of its governmental functions in violation of 18 U.S.C. 371 (*supra* p. 3).

The court vacated respondent's conviction on the substantive counts and remanded for a new trial on the ground that evidence relating to the speech prejudiced his trial on these counts. The convictions of the other defendants were affirmed.

ARGUMENT

INTRODUCTION AND SUMMARY

More than one hundred and ten years ago, Congress made it a crime for a member of Congress to accept a bribe to influence his vote or decision on any matter pending before him in his official capacity. Although it was understood that the speech or de-

bate clause protected voting and other official conduct, no member of Congress, either then or at the time of later similar enactments, evinced concern that the enforcement of such legislation would impinge upon the freedom of legislative speech and debate. Yet the court below reversed respondent's conviction on the supposition that his prosecution for taking a bribe in exchange for an official act would have an inhibiting effect on freedom of speech in Congress.

In our view, the court below, not Congress, misconstrued the constitutional provision. The scope of the speech or debate clause is dictated by its purpose —to promote a free legislative process by relieving Congressmen of apprehension over civil or criminal liability arising out of the performance of their public duties. While this purpose requires the immunization of legislators from liability founded upon the content of their official speech, it does not justify immunity from prosecution for the antecedent unlawful act of taking a bribe to make a speech in Congress—an act which is an offense whether or not the speech is ever given. This critical distinction between liability based on the content of legislative speech and liability based on accepting a bribe is borne out by decisions in the analogous area of judicial privilege and is sustained by analysis of the historical background of the speech or debate clause itself. Not only is the expansive immunity granted by the decision of the court below unnecessary to satisfy the purpose and history of that constitutional provision; it is opposed to the basic concept of responsive rep-

resentative government. The Constitution does not require that only the House of which a faithless legislator is a member may punish him for taking a bribe in connection with his official duties. As we have noted, Congress itself has never doubted that it could make that act a crime, triable in the courts, subject to all the constitutional safeguards which surround a jury trial.

I.

THE SPEECH OR DEBATE CLAUSE DOES NOT RENDER CONGRESS IMPOTENT TO PROVIDE FOR JUDICIAL SANCTIONS AGAINST A CONGRESSMAN WHO ACCEPTS A BRIBE IN EXCHANGE FOR A LEGISLATIVE SPEECH

A. THE RATIONALE OF THE SPEECH OR DEBATE CLAUSE BARS LIABILITY FOUNDED ON THE CONTENT OF A LEGISLATIVE SPEECH BUT DOES NOT BAR LIABILITY BASED ON AN ANTECEDENT CORRUPT AGREEMENT.

1. The speech or debate clause is aimed at promoting an independent Congress, uninhibited from taking action deemed to be in the public interest. To that end, it provides assurance to a representative that no civil or criminal liability can be founded upon his official speech or action. In so doing, it permits the unscrupulous Congressman "to vent his spleen upon others" with impunity because "to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2) (L. Hand, setting forth the rationale of the executive privilege); see *Cochran* v. *Couzens*,

42 F. 2d 783, 784 (C.A.D.C.), certiorari denied, 282 U.S. 874 (applying such rationale to the legislative privilege).

This rationale is applicable in suits based upon the *content* of a legislator's speech or action, where immunity is necessary to prevent impediments to the free discharge of his public duties. But it does not justify granting him immunity from prosecution for accepting or agreeing to accept money to make a speech in Congress. The latter case poses no threat which could reasonably cause a Congressman to restrain himself in his official speech, because no speech, as such, is being questioned. It is only the *antecedent conduct* of accepting or agreeing to accept the bribe which is attacked in such a prosecution. "Whether the party taking the bribe lives up to his corrupt promise or not is immaterial. The agreement is the essence of the offense; when that is consummated, the offense is complete." 3 Wharton, *Criminal Law and Procedure*, § 1383 (Anderson ed. 1957); see also *United States* v. *Hood*, 343 U.S. 148, 151.[3] Precisely the same concept underlies a conspiracy charge. It is settled that "conspiracy is the offense which the statute defines without reference to whether the crime which the conspirators have conspired to commit is consummated." *Williamson* v. *United States*, 207 U.S. 425, 447; *United States* v. *Rabinowich*, 238 U.S. 78, 85-86; *Goldman* v. *United States*, 245 U.S.

[3] The proscription of 18 U.S.C. 201(c) is directed against any public official who, in exchange for the performance of an official act, "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value * * *."

474, 476-477. Thus, if respondent, after accepting the bribe, had failed to carry out his bargain, he could still be prosecuted for the same offense charged here, but it could not be argued that any speech was being "questioned" in his prosecution. The fact that respondent fulfilled his bargain and delivered the corrupt speech should not render the entire course of conduct constitutionally protected.

2. The critical distinction between a prosecution based on the *content* of an official speech and one founded on the *antecedent unlawful conduct* of accepting or agreeing to accept a bribe to make the speech, overlooked by the court below, is well recognized in the case of other established privileges. It is settled that a judge cannot be held liable for the content of any judicial opinion. See *Randall* v. *Brigham*, 7 Wall. 523, 536-539; *Bradley* v. *Fisher*, 13 Wall. 335, 347-350; *Alzua* v. *Johnson*, 231 U.S. 106, 111. But it has never been thought that he is immune from prosecution for accepting a bribe in connection with his official duties. Nothwithstanding the Constitution's provision for impeachment of judges guilty of misconduct, the first Congress, many of whose members were closely identified with the drafting of the Constitution, enacted a statute providing criminal sanctions against judges who take bribes in exchange for an "opinion, judgment or decree." Act of April 30, 1790, Sec. 21, 1 Stat. 112, 117.

The principle which controls this case was applied in *Braatelien* v. *United States*, 147 F. 2d 888 (C.A. 8), where a "Conciliation Commissioner" appointed under the Frazier-Lemke Act of 1940 was charged

as a member of a conspiracy to defraud the United States by the corrupt administration of that Act. Rejecting Braatelien's contention that, under the judicial privilege, he was not subject to punishment for criminal acts performed by him in his judicial capacity as a Commissioner, the court stated (147 F. 2d at 895):

> It is true that as a general rule a judge can not be held criminally liable for erroneous judicial acts done in good faith. * * * But he may be held criminally responsible when he acts fraudulently or corruptly. Judicial title does not render its holder immune to crime even when committed behind the shield of judicial office. *The sufficient answer to this defense is that Braatelien was not indicted for an erroneous or wrongful judicial act. He is charged with conspiracy to defraud the United States by corruptly administering or procuring the corrupt administration of an Act of Congress. The crime charged is distinct from his official acts. It might have been consummated without the performance of a single judicial act on his part.* The crime was complete when the unlawful agreement was made and an overt act was consummated by anyone of the conspirators, even though such overt act be not one laid in the indictment. [Emphasis added.]

See also *United States* v. *Manton*, 107 F. 2d 834 (C.A. 2).

In the prosecution of a judge for taking a bribe in exchange for a judicial decision, as in that of a member of Congress for taking a bribe in exchange

for his official vote or speech, the corrupt official act may be evidence of the offense, but the act as such is not being "questioned" as it would be, for example, in an action for libel. In a suit for libel, giving the speech or rendering the judicial decision would itself constitute the alleged offense, while in a bribery prosecution, the offense is discrete from the speech or the decision.[4]

3. In applying the constitutional provision designed to promote legislative independence, the judgment of Congress that criminal prosecution for bribe-taking in connection with official duties does not restrain legislative freedom is entitled to great weight. Congress was certainly aware of its privilege of free speech and was undoubtedly aware that the privilege encompassed not only debate but voting and other official conduct. Yet Congress has consistently proscribed bribe-taking in connection with such conduct without evidencing the slightest qualm that punishment of the corrupt antecedent act would hamper the legislative process. In 1853 it enacted a statute making it a crime for a member of Congress to accept a bribe "to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the

[4] Similarly, the privilege recognized in *Barr* v. *Matteo*, 360 U.S. 564, could not conceivably extend to prevent the trial of government officials for taking money to perform acts which are within the scope of their authority. Under the reasoning of the court below, such officials could never be prosecuted for bribery without violating the privilege since a bribery prosecution would "question" the motives behind the official act.

United States, be brought before him in his official capacity * * *." 10 Stat. 170, 171. During the debates resulting in the adoption of this Act, no claim was made by any legislator that this Act would impinge upon or impede his right of uninhibited freedom of speech.[5] See the opinion of the district court, App. 54.

As recently as 1962, in a comprehensive revision of the bribery, graft and conflict-of-interest laws, Congress included its own members in the definition of "public officials" whose delinquencies are judicially punishable. Act of October 23, 1962, 76 Stat. 1119, 18 U.S.C. 201. Once again, there was no suggestion in any of the debates that such legislation might in any way restrict the freedom of congressional speech or action.

4. The test used by the court of appeals—that the privilege applies "whenever the motivation for making a speech is called into question" (R. 299)—is too sweeping a formulation and is not properly tailored to the purposes of the speech or debate clause. Contrary to the opinion below, nothing in *Kilbourn* v. *Thompson*, 103 U.S. 168, or *Tenney* v. *Brandhove*, 341 U.S. 367, requires so broad a standard. In *Kilbourn* this Court ruled, *inter alia*, that a Congressman who sponsors and votes for a resolution calling for the arrest of one allegedly in contempt of Congress is immune from a civil suit for malicious prose-

[5] The Senate debate on the 1862 statute, 12 Stat. 577, indicates the strength of congressional conviction that bribe-taking in exchange for official acts should be judicially punishable even though the content of those acts is itself privileged. 80 Cong. Globe 3260-3261.

cution. And *Tenney* held that, in providing civil remedies against persons who, under color of law, deprive individuals of their constitutional rights, Congress could not have intended to authorize suits against legislators for injuries arising from their official conduct. Both cases may be cited for the proposition that, where the speech and debate privilege is otherwise applicable, its protection may not be withheld on the ground that the offensive official act was improperly motivated. But neither case extends the privilege to include prosecutions not founded upon official conduct.

That the two cases relied upon by the court below do not support its ruling is underscored by consideration of *Coffin* v. *Coffin*, 4 Mass. 1, which this Court cited in *Kilbourn* as "perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies." 103 U.S. at 204. *Coffin* involved a civil suit for slander against a member of the Massachusetts House of Representatives for a statement made by him to a fellow legislator in a "passage-way" of the legislative assembly, while unrelated business of the House was going on. On these facts, the court held that the privilege did not apply, because the allegedly slanderous remarks were not made while the defendant "was in the discharge of any official duty" (4 Mass. at 29). As the court pointed out, "when a representative pleads his privilege, to entitle himself to it, it must appear that some language or conduct of his, in the character of a representative. is the

foundation of the prosecution, for in no other character can he claim the privilege" (*id.* at 30).[6]

The error of the court below was perhaps prompted by its misconception of the role of respondent's speech in his trial. The court's observation that "one-half of the testimony introduced at the trial related to the speech" (R. 302) is both inaccurate and insufficiently refined. Only a very small portion of the testimony in the government's case-in-chief (roughly 50 pages of over 2200 pages in the trial transcript) "related" to the speech in any way. And none of that testimony concerned the content or giving of the speech. Rather it dealt with the plans of Edlin, Robinson and Heflin to have such a talk given in Congress (App. 180-184), their drafting and editing of the speech (App. 189-190; R. 4-5), their meetings with respondent and his administrative assistant (App. 189-190), Robinson's and Edlin's comments concerning the speech and how it would benefit them (App. 161-163; R. 4-5), and the use of the reprints of the speech purchased by First Continental (App. 205-206, 257-264; R. 11-12). The court of appeals' own summary of the evidence (R. 315-317) shows that, except for respond-

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[6] The court also said in this connection (4 Mass. at 30): "But to consider every malicious slander, uttered by a citizen, who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege farther than was intended by the people, or than is consistent with sound policy, and would render the representatives' chamber a sanctuary for calumny—an effect which never has been, and, I confidently trust, never will be, endured by any House of Representatives of *Massachusetts*" (emphasis in original).

ent's testimony in his defense,[7] the evidence "relating" to the speech did not focus on the giving of the speech as such but rather on the unlawful antecedent conduct of which the speech was one end product.

We, of course, readily acknowledge that the offense arising from the bribe must be fully proved and that it may not be inferred from the mere fact that the legislator has made a speech favorable to particular interests. In this case, however, the evidence of respondent's guilt, which involved matters wholly extraneous to the speech in Congress, was "more than sufficient to support the jury's verdict" (opinion of the court of appeals, R. 320). Where, as here, the government clearly proved its case independent of the speech or inferences therefrom, no purpose of Article I, Section 6 warrants a reversal.

5. The "practical reason" relied on by the court of appeals (R. 304)—that a "groundless charge [of bribery] may be sufficient to destroy [a member of Congress] at the polls" and that "the process of indictment by a grand jury and inquiry in a court may itself be so devastating that an innocent congressman may well fear it"—argues too much. Since a "groundless charge" of corruption with respect to any official act of a Congressman "may be sufficient to destroy him at the polls," the court's reasoning would require that no bribery statute could ever be invoked against

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[7] As we have noted (n. 2, *supra*) the official copy of respondent's speech was placed in evidence by respondent himself.

any member of Congress.[8] This, of course, is not the law. See, *e.g.*, *Burton* v. *United States*, 202 U.S. 344; *May* v. *United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830. Moreover, if an unscrupulous prosecutor were out "to get" a particular member of Congress, he could secure indictments on "groundless charges" of tax evasion or other crimes unrelated to his official duties; but such a possibility has never warranted the adoption of a rule of absolute immunity from criminal prosecution. In short, the court of appeals has applied a rule which does not fit this case. It is one thing to say that free and uninhibited legislative debate is such an important right of the people that, in order to prevent its erosion, protection is given the subject matter of any speech in Congress, no matter how unworthy its purpose, by immunizing a legislator from civil suit or criminal prosecution for delivering it. See *Tenney* v. *Brandhove*, 341 U.S. 367, 377. It is an entirely different matter to immunize a Congressman, as was done here, from prosecution for a corrupt agreement which would have been actionable whether he made the speech or not.

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[8] 18 U.S.C. 201 (c) prohibits a Congressman from accepting anything of value in return for: (1) the performance of any official act; (2) the commission of any fraud on the United States; and (3) doing or omitting any act in violation of his official duty.

Since most State constitutions also embody the speech or debate privilege (see *Tenney* v. *Brandhove*, 341 U.S. 367, 375 n. 5) the reasoning of the court below also calls into question the numerous provisions directed against the misconduct and conflicts-of-interest of State legislators. See the statutes set out in the opinion of the district court, App. 54 n. 6.

B. THE ENGLISH BACKGROUND SUSTAINS THE VIEW THAT THE PRIVILEGE OF FREE SPEECH AND DEBATE WAS DESIGNED TO PROTECT THE CONTENT OF SPEECH, NOT THE ANTECEDENT ACT OF ACCEPTING A BRIBE.

There is nothing in the historical development [9] of the legislative privilege in England to support the view that it was intended to offer a legislator immunity from prosecution for receiving a bribe to perform an official act. To the contrary, the entire development related solely to the content of official speech or action.

1. The first significant claim that a legislator could not be punished for the content of legislative speech occurred in 1455 in the case of Thomas Yonge (Young), one of the "knights for the shire and town of Bristol." [10] He complained to Commons that he

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[9] The principal authorities we have relied upon for the English historical development are the following: Taswell-Langmead, *English Constitutional History* (Eleventh ed., Plucknett, 1960); May, *Law of Parliament* (7th ed. 1873); 1 Anson, *Law and Custom of the Constitution* (3d ed. 1897); Wittke, *The History of English Parliamentary Privilege* (1921); Neale, *Free Speech in Parliament* (Tudor Studies, 1924); Chrimes, *English Constitutional History* (1953), and 6 Holdsworth, *History of English Law*, (1924). For convenience, we will hereafter refer to these texts by the author, followed by appropriate page numbers.

[10] There is an earlier case (1397) involving one Thomas Haxey who, because he had petitioned Commons that the expenditures of the royal household be reduced, was condemned as a traitor and sentenced to death. In 1399, after Henry IV had ascended the throne, he annulled the judgment on the petition of the Commons which pointed out that the entire procedure was "contrary to the usual course in Parliament, and in destruction of the most ancient customs of the Commons." A number of commentators, however, have dis-

had been arrested for a motion made by him in Commons concerning the descent of the throne. The importance of his petition for relief was the novelty (at that time) of his claim that members of Commons by their ancient liberty "ought to have their freedom to speke and sey in the Hous of their assemble, without eny maner chalange, charge or punycion therefore to be leyde to theyme in eny wyse." [11]

Under Henry VIII, the Commons began to articulate its privileges, at first hesitantly but later with increasing vigor and reliance upon precedent. In 1512 one Richard Strode, a member of the Commons, had been imprisoned by a county court on the ground that certain bills he had introduced in Commons were contrary to the law of the local "stannary" (Parliament) of the county that he represented. By statute, Commons declared the local proceedings void and further enacted, with the approval of the Lords and the Crown, that all suits against members of Parliament "for any bill, spekyng, reasonyng, or declaryng of any mater or maters concerning the Parliament, to be communed and treated of, be utterly voyd and of non effecte." [12] By 1542, and generally thereafter, the petition of the Speaker of the House of Commons

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counted the significance of the case in the development of the privilege because Haxey was not an elected member of Commons. See, *e.g.*, *Taswell-Langmead*, 174-175, 196; *Neale*, 259; but cf. Veeder, *Absolute Immunity In Defamation: Legislative and Executive Proceedings*, 10 Colum. L. Rev. 131, 132, n. 4 (1910).

[11] *Wittke*, 24-25; *Taswell-Langmead*, 196, 247-249.

[12] *Taswell-Langmead*, 248-249.

presented to the King at the opening of Parliament claimed the privilege of legislative freedom of speech among the prerogatives of members of the Commons.[13]

In the time of Elizabeth I, when Commons was claiming the right to initiate legislation, particularly on ecclesiastical matters, Commons asserted an unimpeachable freedom of speech and debate. Thus in 1566, when the Queen commanded Parliament to terminate its discussion concerning her possible marriage or her naming of a successor, a member of Commons questioned whether the Queen's directive cutting off debate was "not against their liberties and privileges." After continued discussion in Commons, the Queen found it advisable to revoke her prohibition.[14] In the next twenty years, this question of initiative led to repeated conflict with the Crown. Commons asserted that a limitation on its power to initiate and debate legislation was in derogation of its privilege of free speech, while Elizabeth sought to control the power of initiative by declarations of prohibition and temporary imprisonment of especially vociferous members of Commons.[15] In her

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[13] *Taswell-Langmead*, 246-247.

The other basic privileges at the time were (1) freedom from arrest and molestation; (2) access to the King's person whenever occasion required and (3) that all proceedings in Commons should receive the most favorable construction from the Crown. See *May*, 64-65.

[14] *Neale*, 276; *Taswell-Langmead*, 311-313, 316-317; *Wittke*, 26-27.

[15] See *Taswell-Langmead*, 313-317; *Wittke*, 26-27; 2 Taylor, *The Origin and Growth of the English Constitution*, 206-207 (1904); *Neale*, 278-285.

eagerness for tactical victories, however, Elizabeth revoked prohibitions previously imposed on legislative speech and left unused powers normally exercised by royal authority.[16] As a consequence, Commons gained the experience and boldness it needed in its struggle with the Stuarts, who sought to create a monarchy free in both theory and practice from the restraints of Commons.

In 1604, one year after James I acceded to the throne, Commons claimed that "the privileges of Parliament were as much their 'undoubted right,' as the right of property which every subject had in his lands or goods; that the House of Commons was a court of record and the highest court in the land; and that these privileges being necessary for the conduct of the business of the House, they could not be 'withheld, denied, or impaired, but with apparent wrong to the whole estate of the realm.' "[17] When James thereafter imposed custom duties without parliamentary consent, commanding Commons not to challenge the Crown's prerogative in this matter, Commons responded that it was "an ancient, general, and undoubted right of Parliament to debate freely all matters which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of Parliament is withal dissolved."[18]

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[16] *Neale*, 285-286.

[17] 6 *Holdsworth*, 93; *Taswell-Langmead*, 334-336.

[18] *Chrimes*, 144-145. This principle was later embodied in the Protestation of 1621. *Taswell-Langmead*, 357-358.

The last significant case in which the privilege of legislative free speech was challenged by the Crown as an infringement on its prerogatives came during the reign of Charles I. In 1629, Eliot, Hollis and Valentine, all members of the Commons, had been imprisoned under a judgment of the Kings Bench for speeches in Commons which Charles I considered libelous and seditious. This judgment was strongly condemned by Commons, and in 1641 it declared the proceedings to be against the law and privilege of Parliament.

In reversing the judgment during the Restoration, Commons resolved that the Act of Henry VIII in Strode's Case in 1512, *supra*, p. 20, was not a special act but a law of general application, "extending to indemnify all and every the members of both houses of Parliament, in all Parliaments, for and touching any bills, speaking, reasoning, or declaring of any matter or matters in and concerning the Parliament to be communed and treated of * * *." [19]

The principle of legislative freedom to speak was firmly fixed when it was embodied in the Bill of Rights of 1689 (I Will. & Mary Sess. 2, c. 2), which declared "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament." [20] Thus, by the beginning of the eighteenth century, the significant century of American colonial development, Commons had the unchallanged right to

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[19] *Wittke*, 29-30.

[20] *May*, 113, 115-116; 1 *Anson*, 153-154; *Taswell-Langmead*, 451.

complete latitude of discussion in the House and the right to initiate and introduce legislation on any matter whatsoever. The embodiment of this right was at the core of the speech or debate clause of our Constitution.[21]

It is significant that the development of the privilege in no way related to conduct beyond the official duties of the legislators. It represented an effort to obtain legislative initiative and to ward off curtailment of Parliament's authority through the device of labelling offensive legislative speech as "libelous" or "seditious." There is a sharp difference between such charges as those against which the speech or debate privilege was erected and the charge of accepting bribery. As to the former, it may be said that "erroneous statement is inevitable in free debate, and * * * it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need * * * to survive * * *.'" *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271-272; see also *Barr* v. *Matteo*, 360 U.S. 564. Proof of bribery, on the

[21] There is no basis for reading the speech or debate clause as embodying any concept of exclusive congressional authority to punish members for taking bribes. It is true that the growth of Parliament's right to discipline its own members paralleled, to some extent, the development of the speech and debate privilege in sixteenth and seventeenth century England. But the expansion of the so called *lex parliamenti*—Parliament's authority to punish offenses to its dignity or integrity, in many instances to the exclusion of the courts—is essentially an eighteenth century development. It took place after the content of the speech and debate privilege had become fixed and was not taken over into American jurisprudence. *Watkins* v. *United States*, 354 U.S. 178, 192.

other hand, involves no such danger of impinging upon the "breathing space" required for free expression because of inferences from inadvertent misstatements.

2. No post-revolutionary English decision in any way undermines the distinction between liability for the content of a legislative speech and liability for a corrupt agreement to make a speech. *Ex parte Wason*, 4 Q.B. 573 (1869), relied on by the court of appeals (R. 297) does not espouse a contrary doctrine. In that case, the complainant alleged that he had given Lord Russell a petition to be presented to the House of Lords for the removal of the Lord Chief Baron from his office. He further alleged that Russell, the Lord Chief Baron and another member of the House agreed to and did make false statements in the House, to the effect that the complaint's charge against the Lord Chief Baron was untrue. On these allegations, the court held that it had no jurisdiction over the complaint on the ground "that *statements made by members of either House of Parliament in their places in the House*, though they might be untrue to their knowledge, *could not be made the foundation of civil or criminal proceedings*, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law." (Opinion of Cockburn, C.J., 4 Q.B. at 576) (Emphasis added.) The Court's own words point up the crucial difference between *Ex parte Wason* and the present case. Here, unlike *Wason*, no statement in the legislature is the foundation of the charge. What is being prosecuted

is an underlying corrupt agreement to accept a bribe, which is subject to criminal sanctions whether the speech is actually made or not. See *Regina* v. *Bunting*, 7 Ont. Rep. 524 (1885, Canada).

C. THE COURT OF APPEALS' CONSTRUCTION OF THE SPEECH OR DEBATE CLAUSE IS OPPOSED TO THE DESIGN OF THE FRAMERS.

From the beginning, American political thinkers emphasized that the right of legislative free speech was for the benefit of the people who were being represented. This concept was embodied in a number of early State constitutions. The Massachusetts Constitution of 1780, for example, provided: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential *to the rights of the people*, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever" (Part The First, Art. XXI).[22] (Emphasis added.)

The privilege had been incorporated in the Articles of Confederation, (Article 5, clause 5) in essentially the same form as it appears in the Constitution. James Wilson, a member of the Committee of Detail which was responsible for the insertion of the speech or debate clause into the Constitution, explained the provision as follows:

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[22] 1 Poore, *Constitutions and Charters*, 956, 959, (1878). See for almost the same formulation, the New Hampshire Constitution of 1784, Part 1 (The Bill of Rights), Article XXX, 2 Poore, *supra*, 1280-1283. See also *Coffin* v. *Coffin*, 4 Mass. 1, 27, 28.

> In order to enable and encourage *a representative of the public to discharge his public trust* with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence. [Emphasis added.] [23]

It would be a serious distortion if a provision designed to promote the fulfillment of a public trust could be used to protect a legislator in the very act of forsaking that trust in favor of a private allegiance. That such a construction of the clause offends the design of the framers is underscored by a consideration of the historical events to which they were reacting at the time they drafted the Constitution.

In the eighteenth century, having lost the power to limit the authority of Commons to speak and initiate legislation, the Crown turned to more subtle methods of control. "Votes which were no longer to be controlled by fear, were purchased with gold." [24] Throughout that period, "the corruption of individual members, by places, by pensions, and by bribery" [25] became a way of political life. The systematic maintenance of a ministerial majority by the regular payment of bribes is said to have been the "invention" of Sir Robert Walpole, Chief Minister of the Crown dur-

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[23] 2 *Works of James Wilson* 38 (Andrews ed. 1896).

[24] 1 May, *The Constitutional History of England*, 300 (1889).

[25] 1 *Anson*, 331.

ing the period.[26] Thereafter, George III, acting as his own minister in these matters, was reputed to have bribed members of Commons to maintain a majority in that House to support his policies in the Revolutionary War.[27]

This technique of government by corruption was greatly aided by the fact that the Commons owed no meaningful responsibility to the people it purportedly represented. As a consequence of the Revolution of 1649, "[t]he prerogative of the Crown had been still further limited; the power and activity of Parliament being proportionally increased, while no means had yet been taken to insure its responsibility to the people. A majority of the House of Commons—beyond the reach of public opinion,—not accountable to its constituencies,—and debating and voting with closed doors,—held the political destinies of England at its mercy." [28] Seats in Commons were controlled by a small number of powerful families, with members responsive to their will. In this situation "when the Crown bid for votes in the House, it was but outbidding or supplementing the influence and connexions of the aristocratic families who dominated the party affiliations of many of the members." [29]

In the middle of the eighteenth century the Crown was able to use Commons to its own purposes in the

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[26] 1 *Anson*, 331-340.

[27] 10 Holdsworth, *History of English Law*, 104-105 (1938).

[28] 1 May, *The Constitutional History of England*, 300 (1889).

[29] *Chrimes*, 171; 1 *Anson*, 343.

celebrated case of John Wilkes. After being thwarted by Wilkes' successful assertion of parliamentary privilege in its attempt to prosecute him for the publication of a paper labelling false certain statements made by George III, the Crown turned to Parliament for help. The "royally-controlled" Commons held the document to be a libel and breach of privilege and ordered it burned. The next few years saw Wilkes repeatedly expelled from Commons in its exercise of control over its own elections despite his repeated election. His struggle with the Crown and Parliament lasted almost twenty years, until he gained final victory. As one scholar has pointed out:

> He had directed popular attention to the royally-controlled House of Commons, and pointed out its unrepresentative character, and had shown how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned.[30]

There can be no doubt that the founders were aware of the political corruption in England when they adopted our Constitution. In obvious reference to this situation, one of the framers pointedly noted that it was "notorious, that [legislators] are more frequently the representatives and instruments of the executive magistrate, than the guardians and advocates of the popular rights."[31] Indeed, the framers could personally testify to

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[30] *Wittke*, 122. See also, *id.* at 115-120.

[31] *The Federalist*, No. 56 (Hamilton or Madison), p. 387 (Bourne ed. 1914).

the use in England of parliamentary privilege "as a screen for the basest oppression." [32] The Wilkes affair was fresh in their minds [33] as were the machinations of George III in bending Commons to his will in the Revolutionary War by financial and other inducements. In the face of this immediate history, one can hardly infer that when the framers embodied in our Constitution the right of legislative free speech and debate, they conceived of it as rendering Congress impotent to provide for judicial prosecution of members of Congress for bribery.[34] The framers, deeply opposed to Parliament's disregard for public sentiment, sought to establish a Congress responsive to the will of its constituents. It would have been contrary to this design to protect legislative bribe-taking from criminal sanctions. Free speech or debate was not to be questioned, but breaches of public trust, such as were common in eighteenth century England, were surely never thought to be privileged.

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[32] *Wittke*, 15.

[33] As James Madison's biographer rhetorically inquired "What American newspaper of the day ever failed to carry his name?" 1 Brant, *James Madison The Virginia Revolutionist*, 136 (1941).

[34] It is interesting to note in this connection that the very same provision of the Constitution which granted freedom of legislative speech (Article 1, Section 6) also provided that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." It has been suggested that this provision was the forerunner of modern day conflict-of-interest statutes. See *United States* v. *Brown*, No. 399, O.T. 1964, slip op. 1, 6, (dissenting opinion).

II.

ARTICLE I, SECTION 5, OF THE CONSTITUTION DOES NOT RESTRICT THE POWER OF CONGRESS TO PROVIDE FOR JUDICIAL PUNISHMENT OF A MEMBER WHO TAKES A BRIBE

Arguably, the court of appeals may have based its opinion in part on the view that "the Constitution has clothed the House of which [respondent] is a member with the sole authority to try him" [35] (R. 303). In so stating, the court referred to that part of Article I, Section 5, which reads:

> Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Any suggestion that this grant of intramural authority carries with it a limitation on judicial power to punish Congressmen for bribe-taking is unsound. Moreover, it has already been flatly rejected by this Court.

1. In *Burton* v. *United States*, 202 U.S. 344, this Court affirmed the conviction of a United States Senator for agreeing to receive and receiving compensation from a private party for his services in relation to a mail fraud proceeding pending before the Post Office Department—a violation of Section 1782 of the Revised Statutes. It was argued that that

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[35] It seems to us more likely that the court below based its decision only upon its construction of the speech or debate clause and then observed that, as a result of that construction, the only forum open to try respondent would be the House.

statute was invalid because it conflicted with Article I, Section 5, by which "the Senate is made * * * the sole judge of the qualifications of its members, and, with the concurrence of two-thirds, may expel a Senator from that body" (202 U.S. at 366). In rejecting this contention, the Court ruled that "there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named" and that "it was never contemplated that the authority of the Senate to admit [a member] to a seat in its body * * * or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact" statutes otherwise within its competence (202 U.S. at 367).

In an analogous situation, this Court has made it clear that a statute providing judicial sanctions for an offense which is also punishable by the House against which it is committed is not objectionable as an invalid delegation of legislative authority. Thus, while Congress has been held to have inherent authority to punish a nonmember for contempt,[36] it may also enact legislation (now 2 U.S.C. 192, originally adopted in 1857)[37] providing for the trial of a con-

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[36] *Anderson* v. *Dunn*, 6 Wheat. 204. But cf. *Marshall* v. *Gordon*, 243 U.S. 521, 543-544 (dictum).

[37] Interestingly, this legislation was directly prompted by the refusal of a newspaperman to divulge to the House of Representatives the names of those Congressmen who he had claimed in the press were soliciting bribes on matters pending in the House. See *Watkins* v. *United States*, 354 U.S. 178, 207-208, n. 45.

tumacious witness in a court of law. *In re Chapman*, 166 U.S. 661, 671-672; *Jurney* v. *MacCracken*, 294 U.S. 125, 151-152. The same principle applies here. Congress may punish its own members for corrupt practices [38] and may also make such behavior a crime triable in the courts.

2. As we have noted (*supra* pp. 7-8, 13-14), Congress has never viewed its disciplinary power as exclusive. Indeed it is by no means clear that even the English Parliament, which had immensely expanded its power to punish for offenses to its prerogatives by the eighteenth century, had succeeded in obtaining the exclusive right to try members accused of taking bribes in connection with their official duties.[39] But

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[38] *In re Chapman*, 166 U.S. 661, involved a Senate investigation into charges that some Senators had been speculating in sugar stocks during the consideration of a tariff bill. The Court held this investigation within the purview of Article I, Section 5 (*id.* at 669-670).

[39] There is no doubt that Parliament itself punished its own members who took bribes. However, one English historian (whose treatise was cited by this Court in discussing the legislative privilege from arrest, *Williamson* v. *United States*, 207 U.S. 425, 442) has written—albeit without the citation of direct authority—that a member of Parliament "who is found guilty of bribery forfeits his seat, and is ineligible for that parliament, besides being liable to prosecution in the same manner as bribed voters and persons corrupting them * * *." Bowyer, *Constitutional Law of England*, 90 (2d ed. 1846). Apparently, Bowyer's view stemmed from the ruling of Lord Mansfield in *Rex* v. *Pitt*, 3 Burr. 1335 (1767) that bribery at election of members of Parliament was always a crime punishable at common law. This ruling has also been relied upon by later Commonwealth cases for the proposition that a legislator was subject to common law punishment for tak-

even if Parliament's disciplinary power were exclusive, it is clear that the framers did not intend to vest Congress with the sole authority in this area.[40] To the contrary, the broad scope of Parliament's power in the middle of the eighteenth century, which had resulted in flagrant abuses,[41] and which was emu-

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ing a bribe in connection with his official duties. See *Rex* v. *Boston*, 33 C.L.R. 386 (1923, Australia); *Regina* v. *White*, 13 S.C.R. 322 (1875, N.S.W.); *Regina* v. *Bunting*, 7 Ont. Rept. 524 (1885, Canada).

[40] That there is no historical link between Congress' disciplinary power and the *lex parliamenti*, the disciplinary power of the eighteenth century Parliament, was noted by this Court in *Anderson* v. *Dunn*, 6 Wheat. 204, 233:

> The truth is, that the exercise of the powers given [Congress] over their own members, was of such a delicate nature, that a constitutional provision became necessary to assert or communicate it. Constituted, as that body is, of the delegates of confederated states, some such provision was necessary to guard against their mutual jealousy, since every proceeding against a representative would indirectly affect the honor or interests of the state which sent him.

[41] By the eighteenth century, Commons "could take cognizance of almost any offense under the *lex parliamenti*, punish it as a breach of privilege, and thus invade the field of jurisdiction that rightly belonged to the judges of the *lex terrae*" (*Wittke*, 200). From its basic privilege that its members were free from civil arrest or molestation, Commons successfully asserted the power to punish trespass on the estates of members, theft of their goods or those of their servants and the arrest of their servants. Correspondingly, members of Commons and their servants were declared to be outside the reach of the common law courts during the time that Parliament was sitting. This led to the sale of "protections", issued under the seal of particular members, stating in effect that named persons were servants of the member and should be

lated, with similar results, in many of the Colonial Assemblies,[42] was viewed with suspicion by the framers. Their writings repeatedly expressed fear of legislative excess. Madison pointed out that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." It was not enough, he thought, for the Constitution "to mark, with precision, the boundaries" of the various departments of government; additionally, he believed that obstacles had to be erected against the possible abuse of power by a legislative assembly. For "in a representative republic, * * * where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the

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free from arrest, imprisonment and molestation during the term of Parliament. In addition, Commons not only asserted the power to determine the outcome of disputed elections but sought to broaden that authority by asserting the sole jurisdiction to determine who composed the lawful electorate in a particular election (*Wittke* 56-57, 63-77; *Taswell-Langmead*, 321-322, 580-582). As this Court described this development in *Watkins* v. *United States*, 354 U.S. 178, 188-191, both Houses of Parliament "claimed absolute and plenary authority over their privileges", the right to declare "what those privileges were", what "new privileges were occasioned", and "what conduct constituted a breach of privilege."

[42] See Clarke, *Parliamentary Privilege in the American Colonies* (1943) particularly at 15-22, 29-58, 72, 103-109, 117, 123-124, 127-130. See also Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. Pa. L. Rev. 691, 780 (1926).

objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions." [43] In the same vein, Jefferson wrote to Madison in 1789 that "[t]he tyranny of the legislatures is the most formidable dread at present, and will be so for long years." [44]

In light of this background, one cannot read into Article I, Section 5 an intention to define a legislative power so sweeping as to preclude judicial investigation of charges of official corruption against members of Congress.

3. Sound considerations of policy support the same conclusion. In the first place, legislative machinery is not well suited to resolving the sensitive issue of individual wrongdoing. The 1857 statute dealing with contumacious witnesses was adopted in part "to avoid the procedural difficulties" inherent in legislative trial.[45] Moreover, the initiation, as well as the outcome, of a legislative trial is apt to be governed by political factors extraneous to the dictates of justice

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[43] *The Federalist*, No. 48, pp. 338-340 (Bourne ed. 1914). See also *The Federalist*, Nos. 49, 56, 73; *United States* v. *Brown*, No. 399, O.T. 1964, slip op. 5-7.

[44] Quoted in *Tenney* v. *Brandhove*, 341 U.S. 367, 375, n. 4.

[45] Of course, an even more important reason was "to permit the imprisonment of a contemnor beyond the expiration of the current session of Congress." *United States* v. *Bryan*, 339 U.S. 323, 327; *Watkins* v. *United States*, 354 U.S. 178, 207, n. 45; *Jurney* v. *MacCracken*, 294 U.S. 125, 151.

in the particular case.[46] As one commentator has recently pointed out, "Congress itself has been notoriously slow and exceedingly reluctant to apply its own palliatives to situations of legislative slander. In the entire course of this country's existence only eighteen attempts were made by Congress to purge itself of what Congress considered 'unhealthy' elements." [47]

A judicial trial, by comparison, offers greater protection to the interests of the public and of the Congressmen involved. The criminal penalty places a Congressman's conduct under inquiry only if a grand jury determines that there is probable cause to believe that he has betrayed the public trust. It gives the accused legislator the benefits of all the constitutional guarantees applicable in the trial of criminal cases, and it provides an impartial tribunal to protect an unpopular Congressman from a politically motivated legislative forum. Moreover, statutes making legislators triable in the court for breaches of their trust help to eliminate suspicions that a legislator's acts are corruptly motivated and promote public confidence in the integrity of Congress.

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[46] See the report of the Senate committee appointed to investigate the case of Senator John Smith, charged with complicity in the Aaron Burr conspiracy. Sen. Doc. No. 278, 53d Cong., 2d Sess., pp. 23-25.

[47] Oppenheim, *Congressional Free Speech*, 8 Loyola L. Rev. 1, 27 (1955-1956); see also Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. Pa. L. Rev. 960, 972-973 (1951).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be vacated and the judgment of conviction reinstated on all counts.

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AUGUST 1965

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 784033 113